RECORD, CASE No. 15,113.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No, 1143.

LEWIS C. KENGLA, PLAINTIFF IN ERROR,

vs.

JOSEPH T. OFFUTT, LATELY DOING BUSINESS AS JOSEPH T. OFFUTT & COMPANY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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a In the Supreme Court of the District of Columbia.

JOSEPH T. OFFUTT, Lately Doing Business under the Name and Style of Joseph T. Offutt & Company,
vs.
LEWIS C. KENGLA. } At Law. No. 28233.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia.

(Filed November 9, 1887. R. J. Meigs, clerk.)

JOSEPH T. OFFUTT, Lately Doing Business under the Name and Style of Joseph T. Offutt & Company,
vs.
LEWIS C. KENGLA. } At Law. No. 28233.

Declaration.

The plaintiff, lately doing business under the name and style of Joseph T. Offutt & Co., as a real-estate broker in the District of Columbia, sues the defendant for that the said defendant, on the 27th day of November, A. D. 1886, contracted and agreed with the plaintiff as such broker for the service and assistance of him, said plaintiff, in affecting and making sale of certain lands of him, the said defendant, in the District aforesaid, known as the "home place" of him, said defendant, and comprising thirty-five (35) acres, more or less, situated near the Tennallytown and Georgetown road; and for that, in consideration of the services and assistance agreed on the part of the plaintiff to be rendered in that behalf the said defendant, by the name and style of L. C. Kengla, promised, stipulated, and agreed with the plaintiff, by the name and style of "Joseph T. Offutt & Co.," that plaintiff should have the exclusive right for the period of six months therein next ensuing to make sale of said lands at a price not less than thirty thousand (30,000) dollars in lawful money of the United States, whereof the sum of ten thousand (10,000) should be paid in cash and the balance in a deferred payment or deferred payments at times to suit the purchaser, bearing interest at the rate of six per centum per annum; and further stipulated, promised, and agreed to and with plaintiff, in manner aforesaid, and for the consideration aforesaid, that the plaintiff should have and

that the defendant would give, allow, and pay to the plaintiff for commission and compensation in respect of any sale made and effected by the plaintiff of the said lands during the period aforesaid the amount over and above the said sum of thirty thousand
2 (30,000) dollars for which such sale might be made and effected by the plaintiff.

And the plaintiff says that in pursuance of his said employment by the defendant and of the promises, stipulations, and agreement aforesaid on the part of the defendant that he, plaintiff, did diligently and to the best of his skill and ability endeavor to effect and make sale of the said lands, and that he, plaintiff, finally and on the 27th day of April, A. D. 1887, and within the said period of six months, did make and effect a sale of the said lands, for the sum of thirty-five thousand (35,000) dollars, to a certain James A. Bates, whereof, by the terms of such sale, the sum of fifteen thousand (15,000) dollars was to be paid in cash and the balance was to be paid in two equal instalments respectively in one and two years, with interest at the rate of six per centum per annum, which said terms of sale the said James A. Bates was ready and willing and able to comply with; yet the defendant, although lawfully bound to consummate said sale and to pay, give, and allow the plaintiff the sum of five thousand (5,000) dollars out of the proceeds thereof, did nevertheless, when notified of said sale and requested to consummate and carry the same into effect and to pay, give, and allow the plaintiff the said sum of five thousand (5,000) dollars, wholly disregard his duty in that behalf, and did wrongfully refuse and decline to consummate said sale and to pay, give, and allow the plaintiff the said sum of five thousand (5,000) dollars, to the damage of the plaintiff five thousand (5,000) dollars, whereof he brings this suit.

Second count. And the plaintiff sues the defendant for that the said defendant, on the 27th day of November, A. D. 1886, contracted and agreed with the plaintiff, who was then doing business at the District of Columbia, as a real-estate broker, under the name and style of Joseph T. Offutt & Company, for the service and assistance of him, the plaintiff, as such broker, in effecting and making sale of certain lands of him, the said defendant, in the District aforesaid, known as the "home place" of him, the said defendant, and
3 comprising thirty-five (35) acres of land, more or less, situated near the Tenallytown and Georgetown road, and for that in consideration of the services and assistance agreed on the part of the plaintiff to be rendered in that behalf the said defendant, by the name and style of L. C. Kengla, promised, stipulated, and agreed with the plaintiff, by the name and style of "Joseph T. Offutt & Co.," that plaintiff should have exclusive right for the period of six months thereon next ensuing to make sale of said lands at a price not less than thirty thousand (30,000) dollars in lawful money of the United States, whereof the sum of ten thousand (10,000) dollars should be paid "down"—that is to say, in cash—and the balance on time to suit, at six per cent.—that is to say (according to the usage of the business of real-estate brokers in said District in such cases), the balance to be paid in one or more deferred payments, bearing

interest at the rate of six per centum per annum and payable in five years or in any shorter period of time than five years, at the option of and as the purchaser might elect, and such deferred payment or payments to be secured by a deed of trust upon the property sold; and further stipulated, promised, and agreed to and with plaintiff, in manner aforesaid and for the consideration aforesaid, that the plaintiff should have, and that the defendant would give, allow, and pay to the plaintiff, for compensation and commission in respect of any such sale made and effected by the plaintiff of the said lands during the period aforesaid the amount over and above said sum of thirty thousand (30,000) dollars for which such sale might be made and effected by the plaintiff.

And the plaintiff says that in pursuance of his said employment and of the contract, promises, stipulations, and agreements aforesaid on the part of the defendant that he, plaintiff, did diligently and to the best of his skill and ability endeavor to effect and make sale of the said lands, and that he, plaintiff, finally and on the 27th day of April, A. D. 1887, and within the said period of six months, did make and effect a sale of the said lands, for the sum of thirty-five — (35,000) dollars, to a certain James A. Bates,
4 whereof, by the terms of such sale, the sum of fifteen thousand (15,000) dollars was to be paid in cash and the balance was to be paid in two equal installments of ten thousand (10,000) dollars each respectively in one and two years, with interest at the rate of six per centum per annum, which said terms of sale the said James A. Bates was ready and willing and able to comply with; yet the defendant, although bound to consummate said sale and to pay, give, and allow to the plaintiff the sum of five thousand (5,000) dollars out of the proceeds thereof, did nevertheless, when notified of said sale and requested to consummate and carry the same into effect and to pay, give, and allow the plaintiff the said sum of five thousand (5,000) dollars, wholly disregarded his duty in that behalf and did wrongfully refuse and decline to consummate said sale and to pay, give, and allow the plaintiff the said sum of five thousand (5,000) dollars, to the damage of the plaintiff five thousand (5,000) dollars; whereupon he brings suit.

Third count. And the plaintiff sues the defendant for that the said defendant heretofore, to wit, on the 27th day of November, A. D. 1886, contracted and agreed with the plaintiff, who was then doing business at the District of Columbia as a real-estate broker under the name and style of Joseph T. Offutt and Company, for the service and assistance of him, the said plaintiff, in effecting and making sale of certain lands of him, the said defendant, in the said District, and known as the "home place" of him, the said defendant, and comprising thirty-five (35) acres, more or less, and for that in consideration of the services and assistance to be rendered by the plaintiff in making and effecting a sale of the said premises the said defendant promised and agreed to pay the plaintiff what his services and assistance in making and effecting such sale would be reasonably.

And plaintiff says that in pursuance of his said employment and

the said promise and agreement of the defendant that he, plaintiff did, diligently and to the best of his skill and ability, endeavor to find a purchaser for the said land and to make sale thereof, and that finally and on the 27th day of April, A. D. 1887, he did make
5 and effect a sale of the said lands to one James A. Bates for the sum of thirty-five thousand (35,000) dollars, whereof, by the terms of such sale, the sum of fifteen thousand (15,000) dollars was to be paid in cash and the balance in two equal installments of ten thousand (10,000) dollars each in one and two years respectively, with interest at the rate of six per centum per annum, which deferred payments were to be secured by a deed of trust upon the property so sold.

And plaintiff says that by the terms of his employment aforesaid he, plaintiff, was duly authorized and empowered to make said sale as aforesaid, and that said James A. Bates was ready and willing and able to comply with the terms thereof, but that the said defendant wrongfully refused to consummate the same and wrongfully refused to pay plaintiff for *the* his services in procuring said purchaser and making and effecting said sale, to the damage of the plaintiff five thousand (5,000) dollars; wherefore he brings this suit.

And the plaintiff claims five thousand dollars, with interest from the 27th day of April, A. D. 1887, besides costs.

HUGH T. TAGGART,
Att'y for Plaintiff.

DISTRICT OF COLUMBIA, *ss:*

On the 2d day of November, A. D. 1887, before me, at the District aforesaid, personally appeared Joseph T. Offutt, who, being by me duly sworn, doth say that he is the plaintiff in the above-entitled cause; that on the 27th day of November, A. D. 1888, he was engaged in business in said District as a real-estate broker; that on said day the defendant gave him the exclusive right to sell certain lands of the said defendant in the county of Washington, in said District, for the period of six months, for the sum of $30,000.00, whereof $10,000.00 was to be paid in cash and the balance on time to suit the purchaser, and to bear interest at the rate of six per centum per annum, and agreed to allow deponent for his compensation all over and above the sum of thirty thousand (30,000) dollars for which he, de-
6 ponent, *did* might sell said lands; that within the said period of six months he, deponent, did effect and make sale of said lands to James A. Bates for the sum of $35,000.00, whereof, by the terms of said sale, the sum of fifteen thousand (15,000) dollars was to be paid in cash and the balance in two sums of ten thousand (10,000) dollars each, in one and two years, with interest at the rate of six per centum per annum, and to be secured by deed of trust upon the said property so sold; that the said sale was made within the said period of six months, to wit, on the 27th day — April, A. D. 1887, and the said James A. Bates was ready and willing to comply with its terms and able to do so; that the said defendant refused to consummate said sale and refuses to pay deponent the sum of five thousand (5,000) dollars due him for his services in that behalf.

And deponent says that the said sum of $5,000 is justly due him from the defendant, exclusive of all set-offs and just grounds of defense, as he verily believes.

JOSEPH T. OFFUTT.

M. V. BUCKEY.

Subscribed and sworn to before me the day and year first above written.

M. V. BUCKEY, [SEAL.]
Justice of the Peace.

Notice to Plead.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

HUGH T. TAGGART,
Att'y for Pl'ff.

7 *Defendant's Plea.*

In the Supreme Court of the District of Columbia.

(Filed Dec. 16, 1887 R. J. Meigs, clerk.)

J. T. OFFUTT
vs.
LEWIS C. KENGLA. } Law. No. 28233.

The defendants, for plea to the several counts of the pl't'ff's declaration, says he is not indebted as alleged.

WILLIAM A. COOK,
Att'y for Def't.

Aff'd't of Def't.

In the Supreme Court of the District of Columbia.

(Filed Dec. 16, 1887. R. J. Meigs, clerk.)

JOSEPH T. OFFUTT
vs.
LEWIS C. KENGLA. } At Law. No. 28233, Docket No., —.

Affidavit of Lewis C. Kengla.

DISTRICT OF COLUMBIA,
County of Washington, } *ss:*

Personally appeared before me Lewis C. Kengla, who, being duly sworn according to law, deposes and says as follows:

That he is not indebted to the plaintiff as alleged; that he never gave the plaintiff the exclusive right to sell his lands referred to and mentioned in the declaration in this cause filed, as alleged, for the period of six months, for the sum of thirty thousand dollars

($30,000.00), ten thousand dollars ($10,000.00) to be paid in cash and the balance to suit the purchaser, and to bear interest at the
8 rate of six per cent. per annum, and that he did not agree to allow the plaintiff for compensation all over and above the sum of thirty thousand dollars ($30,000.00) for which the property might be sold; and he further says, upon information and belief, that the plaintiff did not make the sale of said lands to James A. Bates, as set forth in the declaration and affidavits thereunto attached, according to any agreement made between the plaintiff and defendant; and he further says that the alleged sale set forth in the affidavit of the plaintiff to his declaration, if made at all, was without authority and inconsistent with the terms of the alleged agreement between the plaintiff and the defendant, and that no amount is due from the defendant to the plaintiff on account of the alleged sale to the said Bates or otherwise as compensation for said pretended sale; and he further says that at one time the plaintiff obtained permission from him to sell the said property, but that it was a mere permission, without any consideration, and, long before the pretended sale to the said Bates, was withdrawn and revoked and the plaintiff notified of the fact, and that he should not and would not be allowed to deal in any manner with the property, and that if he did so it was without any authority or agreement authorizing him to do so emanating from the defendant and in disregard of his wishes, notice, and rights, and intended to obtain from the defendant a large amount of money, viz., the sum of five thousand dollars ($5,000.00), without any consideration therefor and without the least authority from the defendant to dispose of his said property, as he claims to have done.

LEWIS C. KENGLA.

Sworn and subscribed before me this 16th day of December, 1887.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Ass't Clerk.

9 *Exceptions to Charge.*

In the Supreme Court of the District of Columbia.

OFFUTT
vs.
KENGLA.

Exceptions to charge of court.

1. The court erred in not instructing the jury, as requested, that pl't'ff was not entitled to a verdict.

2. In overruling the point that, as the pl't'ff sued on an alleged contract made with him by the defendant as a real-estate broker, that he could not recover in view of the fact that it appeared that he was not a real-estate broker, not having had a license, as required by the laws of the District of Columbia and not being, as claimed, a broker.

3. The court erred in overruling the point that there could be no recovery by the pl't'ff because there was no compliance by him with the stipulation of the alleged contract that $10,000.00 should be paid in cash and the balance in amounts to suit, the pl't'ff having departed without the knowledge or consent of the defendant from the terms of the alleged contract and having, in addition to the alleged reception of fifteen thousand dollars instead of $10,000.00, fixed the time for payment of the balance himself, or without any consultation with or knowledge of the defendant.

4. Because the court erred in overruling the point that the pl't'ff could not recover on the ground that he had not made a sale of the def't's property, and, if made at all, that it was made by one Wiemer and not by the defendant, the transaction between the alleged purchaser, Bates, being with the said Wiemer, including the receipt for $750.00, and the check for that sum bein- in the name of said Wiemer and deposited in bank of Riggs & Co. to the credit of said Wiemer.

10 *Verdict.*

OFFUTT
vs.
KENGLA.

JUNE 27, 1890.

We, the jurors comprising the jury in this cause, find for the plaintiff (and assess the damages at the sum of five thousand dollars ($5,000.00), with interest, at six per cent., from date of sale).

OWEN O'HARE, *Foreman.*
W. A. WIMSATT.
JOHN G. SLATER.
ROB'T W. DARR.
CLARENCE BEALL.
JAS. T. HARRISON.
W. H. STICKELL.
W. B. HARTLEY.
GILES A. DEMONET.
A. S. CAYWOOD.
F. B. DANTE.
E. G. GUMMEL.

Objections to Change of Verdict.

In the Supreme Court of the District of Columbia.

(Filed June 30, 1890. R. J. Meigs, clerk.)

OFFUTT
vs.
KINGLA. Law. No. 28233.

And now, to wit, June 30, 1890, the jury having returned a sealed verdict for the plaintiff without designating the amount, the defendant, by his att'y, insisted that the verdict be recorded as rendered; but the court declined to so direct, to which the defendant excepted;

and thereupon the court directed the jury to retire and fix the amount, and thereupon the jury did so, and returned a ver-
11 dict for the plaintiff for the sum of $5,000.00, with interest from the day of sale; to the recording and rendition of which verdict the defendant, by his att'y, objected, on the ground that the verdict was not the one rendered and agreed to by the jury and sealed by them on Friday and which they were directed to return in court on this Monday and which was rendered, and to the whole proceeding as irregular and unauthorized.

WILLIAM A. COOK,
Att'y for Def't.

MONDAY, *June 30th, A. D.* 1890.

Session resumed pursuant to adjournment, Montgomery, justice, presiding.

Judgment of Court Ordering Jury to Retire and Fix Amount.

JOSEPH T. OFFUTT, Lately Doing Business as Joseph T. Offutt and Company, Plaintiff,
vs.
LEWIS C. KENGLA, Defendant. } At Law. No. 28233.

Now, again come here the parties aforesaid in manner aforesaid, and the same jury return into court and on their oath say they find said issues in favor of the plaintiff, but do not state the amount; whereupon the court directs the jury to again retire and fix the amount of their verdict; to which Mr. Cook, att'y for the defendant, excepts and asks that the verdict be recorded as rendered, which exception is overruled; and the jury again return into court and on their oath say they find said issues in favor of the plaintiff, and that the money payable to him by the defendant by reason of the premises is the sum of five thousand dollars, with interest from date of sale, which date is not named by the jury. To the rendition and recording of said verdict Mr. Cook again excepts, which exception is also overruled; and thereupon Mr. Taggart agrees to a remittitur of the interest. Thereupon it is considered that the plaintiff recover against said defendant five thousand dollars, being the money
12 payable to him by the defendant by reason of the premises, and $— for his costs of suit, and have execution thereof.

Motion to Set Aside Verdict.

In the Supreme Court of the District of Columbia, Holding a Circuit Court.

(Filed July 3, 1890. R. J. Meigs, clerk.)

JOSEPH T. OFFUTT
vs.
LEWIS C. KENGLA. } Law. No. 28233.

The def't, by his att'ys, moves the court to set aside and vacate the judgment as entered, among other reasons:

(1.) Because irregularly entered, as appears from the minutes of the court and objections filed to the entry thereof.

(2.) And also because the jury received the case on Friday, June 27th inst., retired on that day, agreed on a verdict, which was signed and sealed; then separated, returned into court on Monday, announced their verdict by handing in the paper sealed by them, which announced a general finding for the defendant, which finding was not received or entered; but the jury were instructed to retire, did so, and rendered another and different verdict.

(3.) Because the entry on the minutes of the finding of the jury is not a verdict in fact or law, but only in form.

COOK & SUTHERLAND,
Att'ys for Def't.

Motion for a New Trial.

In the Supreme Court of the District of Columbia, Holding a Circuit Court.

(Filed July 3, 1890. R. J. Meigs, clerk.)

JOSEPH P. OFFUTT
vs.
LEWIS C. KENGLA. } Law. No. 28233.

The defendant moves the court for a new trial:

13 1. Because the verdict is contrary to the evidence.

2. Because contrary (to) the law.

3. Because the court erred in overruling the several points of law or requests for instruction made by the defendant.

COOK & SUTHERLAND,
Att'ys for Def't.

Statement of the Case.

Case.

In the Supreme Court of the District of Columbia.

(Filed Aug. 2, 1890. R. J. Meigs, clerk.)

JOSEPH T. OFFUTT, Doing Business under the Name and Style of Joseph T. Offutt & Co.,
vs.
LEWIS C. KENGLA. } At Law. No. 28233, Doc't No. —, Calendar of April Term, 1890.

Be it remembered that on the trial of this cause before Mr. Justice Montgomery and a jury at the above term the plaintiff, to maintain the issues on his part joined, gave in evidence the following testimony, substantially, through witnesses sworn and examined in his behalf, viz:

Testimony for Plaintiff.

Testimony of Joseph T. Offutt for the Plaintiff.

Joseph T. Offutt testified that he is the plaintiff in this suit; that he resided in the neighborhood of Tenallytown, in the District of Columbia, and had resided there for many years, and that the defendant formally resided in the same vicinity; that he (witness) was engaged in the business of a real-estate broker on November 27, 1886, and had been so engaged for some time prior to said date; that upon engaging in said business he adopted the name and style of Joseph T. Offutt & Co., as he then contemplated taking in a partner, which was not done, and he had continued the business under said name and style; that the defendant and witness had been acquainted for many years; that said defendant spoke to wit-
14 ness in regard to effecting a sale of the property for him upon which he, the defendant, lived, and after some interviews in regard to the matter the defendant signed and gave to witness an instrument of writing, which said instrument of writing the witness produced, and the same was given in evidence and is of the tenor following:

"Nov. 27th, 1886.

I hereby give Joseph T. Offutt & Co. the exclusive right to sell my home place, and limit the time of 6 months to sell at $30,000; property is situated near the Tenallytown and Georgetown road, in D. C., consisting — 35 acres, more or less, for the sum of $30,000 in lawful U. S. money. Terms, $10,000 down, the balance on time to suit, at 6 per cent., and give them all above my price above for their commission.

L. C. KENGLA."

And the witness further testified that upon receiving said paper he called on Mr. John W. Thompson and other persons and endeavored to effect a sale of the property; that he called on Mr. James B. Wimer, of the firm of Cutter and Wimer, real-estate agents; told him of his employment to sell and showed him his authority, and asked their aid in effecting a sale; that Mr. Wimer subsequently told witness that he had a purchaser for the property if it suited; that witness took Mr. Wimer out to the defendant's place to look at it and introduced Mr. Wimer to Mr. Kingla as a real-estate dealer, the defendant stating to him, Mr. Kengla, that if the place suited they had a purchaser; that Mr. Kengla acted as if greatly pleased at the prospect of making a sale, as also did Mr. Kengla's wife; that Mr. Kengla showed them all around and over the place and after the place had been examined Mr. Kengla, the defendant, slapped the witness on the shoulder and said: "Joe, if you sell me out you will have to get me another place;" and Mrs. Kengla, before their departure, made Mr. Wimer a present of a setter dog; that on April 27, 1887, one week after this visit to Mr. Kingla's place, plaintiff made sale to James A. Bates of Mr. Kengla's place for the

price of $35,000.00, of which by the terms of sale $15,000 was to be paid in cash and the balance was to be paid in two equal in-
15 stallments in one and two years, with interest at six per centum per annum, to be secured by a deed of trust on the place, and Col. Bates, the purchaser, made a deposit of $750.00 on account of purchase-money; that on the day the property was sold witness went to the market, where Mr. Kengla was doing business, and in defendant's absence left word with his son for defendant to call and see witness, as sale had been made of the place; that subsequently defendant, in company with his brother Robert, drove up and witness met them on F street, in front of Mr. Wimer's office, this being the first time that he had seen Mr. Kengla since the visit of witness and Mr. Wimer to his place; that defendant said, "You have sold the place;" to which witness replied, "Yes." Defendant then asked "for what price;" to which witness replied, "I have got the price you asked. I have sold for $35,000." Defendant then said, "Do you take me for a damn fool? I don't intend to let anybody make $5,000 off me." Then witness said, "What do you mean? didn't you authorize me to sell?" that defendant said, "Hold back this sale and I will pay you for your trouble; the price is not enough;" that witness then said it is too late; that he (defendant) ought to have spoken before, and that if he (defendant) would carry out the sale witness would allow him $2,500 out of his commissions, making the sum to be paid him (defendant) $32,500 The defendant did not accept the proposition, and drove away; then, under date of May 3, 1887, witness wrote and mailed to the defendant the following letter:

"WASHINGTON, D. C., *May* 3, 1887.

L. C. Kengla, 7th-street wing, Center market, Washington, D. C.

DEAR SIR: We have on the 27th day of April, 1887, taken a deposit from the purchaser on the sale made of your home place of 35 acres, more or less, situated near the Tenallytown and Georgetown road, in D. C., in accordance with your writing to Joseph T. Offutt & Co., dated Nov. 27, 1886.

It is requested that you furnish at once such papers as will enable me to expedite the consummation of said sale and see me to
16 arrange the details of terms, &c.

JOSEPH T. OFFUTT & CO."

That a few days thereafter witness met defendant on F street, and they went together to the office of Mr. Wimer; that Col. Bates, the purchaser, was sent for and introduced to the defendant; that witness said that he (defendant) ought to have said so before, and asked defendant if he (defendant) had not authorized witness to sell at $30,000, and handed the writing of November 26, 1886, to the defendant and asked him if that was not his signature; that defendant replied that it was; that the price was not enough, and that the defendant asked the witness to let him have the paper to show to his wife, and witness gave it to him, and that it was subsequently returned to witness through Col. Cook, defendant's attorney; that

defendant has refused to consummate the sale and has not paid plaintiff.

Cross-examination:

And upon cross-examination the witness, Joseph T. Offutt, testified that he and defendant had been the best of friends for years; that they used to meet every day; that witness drew up the writing which defendant signed; that the date of the writing, November 27, 1886, the witness had not taken out a license as a real-estate broker, as required by the license law of the District; that he took out such license in April, 1887, a short time before he made sale of the property. And in response to the question:

"Did you not, some time prior to any pretended sale, meet Mr. Kengla and his brother Joe and his son Harry in the Center market, when he told you in their presence not to sell the property and to give him the paper?

Said "No such conversation ever took place;" and further testified that Mr. Kengla never told the witness not to sell the property for $30,000.00; that witness thought property had gone up in the meantime, and that he had heard what Mr. Kengla sold the property for subsequently; that no money passed when the paper
17 of November 27, 1886, was signed; that before making the sale to Col. Bates he did not consult with Mr. Kengla; did not think it necessary; that witness did not directly affect the sale; that it was made by Mr. Wimer, who was acting for him and by his authority; the deposit of $750.00 was made by Col. Bates with Mr. Wimer; does not know positively, but thinks that it was deposited in Riggs' bank; the sale was for $35,000, and Col. Bates agreed to pay $15,000.00 cash; was never authorized specially and outside of the paper to call for $15,000.00 in cash. After leaving word with Mr. Kengla's son at the market, met Mr. Kengla and his brother on F street and told him of the sale; that there never was any modification of the contract shown in the paper.

Redirect examination:

And on redirect examination the witness, Joseph T. Offutt, testified that neither at the Center market nor on the occasion of the visit of Mr. Wimer and the witness to Mr. Kengla's place, nor at the first conversation had with the defendant on F street, after the sale, nor at any time or place prior to the sale, did the defendant revoke or claim to have revoked the authority to sell given the plaintiff on November 26, 1887, and that he (witness) had refrained from taking out a license on the advice of Mr. Robert P. Dodge, the official of the District who had charge of that branch, who informed witness that legislation was pending in Congress which would do away with the bond and tax on receipts then required and provide for the payment of a license tax only, and that when the act was passed witness paid the license tax.

Testimony of James B. Wimer.

James B. Wimer testified that on November 27, 1886, he was a member of the firm of Cutter & Wimer, real-estate agents; that Mr. Offutt, the plaintiff, showed him the paper signed by Mr. Kengla and asked his assistance in making sale of this property; saw Col. James A. Bates, who said if the place suited he would buy; that witness went with Mr. Offutt out to Mr. Kengla's place to look at it, and was there introduced by Mr. Offutt to Mr. Kengla as a real-estate dealer, and Mr. Kengla was told that if the place suited they had a purchaser for it; that Mr. Kengla took *n*itness over the place
18 and showed him every part of it, and seemed greatly pleased at the prospect of the sale; that Mrs. Kengla made Wimer a present of a setter dog, which they said was a fine one. Nothing was said by Mr. Kengla about having revoked Mr. Offutt's authority to sell. On the contrary, Mr. Kengla, as witness and Offutt were about leaving, said to Mr. Offutt that if he (Offutt) sold him out, he (Offutt) must get him (Kengla) another place. A couple of days after this visit witness took Col. Bates out to the place, and returning met Mr. Kengla on the road; that Col. Bates determined to buy a couple of days after his visit to the place, and agreed to pay $35,000 for it—$15,000 in cash and the balance in two equal sums in one and two years, with interest at six per cent., to be secured by deed of trust on the place—and witness took from him, in a check payable to witness April 27, 1887, a deposit of $750 on account of the sale, which witness deposited in Riggs' bank to his own credit, and reported his action to Mr. Offutt, under whose authority he acted. The sale was made about one week after the visit of witness and Offutt to the place; that subsequently the defendant and Mr. Offutt came into the office of witness on F street, and Col. Bates was sent for and introduced to Mr. Kengla as the purchaser, and was informed that Col. Bates was ready to comply with the terms of sale, and Mr. Kengla was requested to consummate it, which he declined to do, saying that the price was not enough, and that his wife would not sign the deed, and he said, "I have withdrawn the property." Upon the production of the paper of November 27, 1886, he admitted that he had signed it and asked Mr. Offutt to let him take it to show to his (defendant's) wife, and said, I told you, Offutt, not to sell; that Col. Bates was a retired officer and a man of means and was ready to comply with the terms of his purchase and was only prevented from doing so by Mr. Kengla's refusal to consummate the sale.

Cross-examination:

On cross-examination the witness, James B. Wimer, testified that at the meeting at the office of witness the defendant did not assent to, or approve, or recognize the sale made to Col. Bates; that
19 he (defendant) got no money from it, and the sale was never consummated; that the check of Col. Bates for the deposit was to the order of witness and was deposited in Riggs' bank to his

own account, and that the defendant could not have obtained the deposit without the action of witness.

Testimony of James A. Bates.

James A. Bates testified that he was the purchaser of the property, and that his attention was called to the property by Mr. Wimer; told him if it suited witness would buy; went out to look at it with Mr. Wimer; a few days afterwards agreed to pay $35,000.00 for it, $15,000.00 in cash and the balance in two equal installments in one and two years, with interest at 6 per cent., to be secured on the property; witness had the money and was ready and willing to carry the purchase out, and was prevented from doing so by Mr. Kengla's refusal to consummate the sale; witness subsequently invested the money in another parcel of ground in the same vicinity; that he had no transaction with the defendant concerning the property.

And there the plaintiff rested.

And thereupon the defendant, to maintain his issue on his part joined, gave in evidence the following testimony, substantially, through witnesses sworn and examined in his behalf, viz:

Testimony for the Defendant.

Testimony of Lewis C. Kengla for defendant.

Lewis C. Kengla testified that he was the defendant and a butcher and was formerly the owner of 35 acres of land in the county of Washington, D. C., near Tennallytown and Georgetown road, on which he then lived; that he did not authorize the plaintiff to sell it; that plaintiff drew up the paper of November 27, 1886, and asked witness to sign it at his stall, in the Center market, and that he, witness, did sign it; that about three months after this, at witness'*es* stall, in the Center market, witness told plaintiff not to sell his property, and return the paper to witness; this was about two months before the sale made by Offutt, and that the brother and son of witness were present when he told this to Offutt; that
20 Offutt notified witness of the sale by telling witness' son; that witness met Offutt on F street and Offutt informed him of the sale and said that he had sold for $30,000; that witness told him (Offutt) that the property was witness' property, and not Offutt's; that the price was too small; met Offutt again on F street and went with him to Wimer's office, and there told Col. Bates that he, witness, would not recognize the *the* sale; Bates said he did not see how witness was going to get out of it; they offered witness $32,500 for the property, but witness would not take it; that Offutt, the plaintiff, never consulted witness about the sale prior to making it; that the property had advanced very much, and witness thought that he, witness, had a right to the advance, and that witness subsequently sold the property for $40,000, and that Offutt had nothing to do with the sale.

Cross-examination:

And on cross-examination the witness, Lewis C. Kengla, testified that prior to meeting Offutt on November 27, 1886, at the market-house, when the paper was signed, he, witness, had had no conversation with Offutt in regard to the sale of the place; that witness told Offutt not to sell the place and to return the paper about two months before Offutt made the sale; that he (witness) remembered the visit of Offutt and Wimer to the place; that he did not remember that a setter dog was given at that time to Mr. Wimer; that he did not remember saying to Offutt at their first meeting, on F street, after the sale by Offutt, to hold back the sale, and that he (witness) would pay him (Offutt) for his trouble.

Testimony of Joseph Kengla.

Joseph Kengla testified that he was a brother of Lewis C. Kengla, the defendant; that the stall of witness backs up to that of his brother, in the Center market, and that he heard his brother request Offutt not to sell the property and to give him the paper back.

Cross-examination:

And on cross-examination the witness, Joseph Kengla, testified that this took place a month or two before the sale was made
21 by Offutt, and that he (witness) could not remember anything else that was said at the time.

Testimony of Harry Kengla.

Harry Kengla testified that he was a son of the defendant and was present at the market when Offutt came there, and that witness heard his father tell Offutt not to sell and to take his name off that paper.

Cross-examination:

And on cross-examination the witness, Harry Kengla, stated that the conversation between his father and Offutt took place a couple of months before the sale was made by Offutt, and that he remembered nothing else that was said at said interview.

Testimony of J. T. Dyer.

J. T. Dyer testified that he was a real-estate agent and a member of the firm of Hufty & Dyer, and that he sold the property of Mr. Kengla, the defendant, for $40,000.00 net to him, Kengla, and that Mr. Offutt had nothing to do with the sale.

Cross-examination:

And on cross-examination the witness, J. T. Dyer, testified that he sold the property for $45,000.00, and that by the terms of his arrangement with Mr. Kengla in regard to the sale he (witness) got $5,000.00 for his commissions.

Testimony of Joseph T. Offutt in Rebuttal.

And then the defendant rested; and thereupon the plaintiff, Joseph T. Offutt, was recalled and testified, in rebuttal, that neither at the Centre market nor at any other place did the defendant, prior to the sale made by the plaintiff, tell him (witness) not to sell the property or request him to return the paper of November 27, 1887, or take his (defendant's) name from it or claim that it had been revoked.

And the foregoing was all the evidence given in said cause.

And thereupon, after argument by counsel for the respective parties, the jury was charged by the court, and about 4 o'clock p. m. of Friday, June 29, 1890, the court directed the jury to retire, in
22 charge of a bailiff, with instructions, in case of their agreement, to reduce their verdict to writing and seal the same and return it to the court on the following Monday morning; at which time the jury, in open court, through their foreman, returned a sealed verdict, which was opened by the court and which read as follows: "We, the jurors composing the jury in this cause, find for the plaintiff," and was signed by all the members of said jury, and thereupon the jury were informed by the court that the verdict was informal, as the amount of their finding was not stated in it; whereupon the foreman of the jury stated to the court on behalf of the jury that before the writing and signing of the verdict by the jury the jury had agreed upon the amount, but had thought it unnecessary to state it in the paper; and thereupon the defendant, by his counsel, moved that the verdict as returned be recorded as the finding of the jury, which motion was overruled by the court; and thereupon the jury were directed by the court to retire, in charge of a bailiff, and complete their verdict by the addition of the amount which they found to be due; and thereupon the jury returned their verdict as follaws: "We, the jurors composing the jury in this cause, find for the plaintiff, and assess the damages at $5,000.00, with interest at 6 per cent. from day of sale;" and thereupon the plaintiff, by his counsel, remitted the interest so found and moved the court that the verdict stand and be recorded as a finding for the plaintiff of $5,000.00, which was done and entry of the verdict and judgment thereon was made upon the minutes of the court as follows:

And forasmuch as many of the said matters are not of record the defendant, by his counsel, moves the court that they may be made so, and that the foregoing statement be settled as a case, and it is done accordingly this 2nd day of August, A. D. 1890.

M. V. MONTGOMERY, *Justice.* [SEAL.]

23 *Bill of Exceptions.*

In the Supreme Court of the District of Columbia.

JOSEPH T. OFFUTT, Doing Business under the Name and Style of Joseph T. Offutt & Co., *vs.* LEWIS C. KENGLA.	At Law. No. 28233. No. —. Calendar of Term, 1890.

Be it remembered that on the trial of the above cause before Mr. Justice Montgomery and a jury the plaintiff, to maintain the issue on his part, gave evidence tending to prove, among other things, that on November 27, 1886, he was engaged in business as a real-estate broker, under the name and style of Joseph T. Offutt & Co.; that on said day the defendant gave him, by the name and style of Joseph T. Offutt & Co., in writing, the exclusive right for the period of six months to make *make* sale of certain lands of defendant in the county of Washington, D. C., for the sum of $30,000, of which $10,000 should be paid in cash and the balance on time to suit, and giving him, plaintiff, all over and above said sum for which he might make sale of said lands; that on April 27, 1887, he made sale of said lands to James A. Bates for the sum of $35,000, whereof $15,000 was by the terms of sale to be paid in cash and the balance in two equal investments in one and two years, with interest at six per centum, to be secured by deed of trust; that plaintiff on said November 27, 1886, had not taken out a license as a real-estate broker under the laws of the District of Columbia; which law is as follows:

Be it enacted by the legislative assembly of the District of Columbia, That no person shall be engaged in any trade, business, or profession hereinafter mentioned until he shall have obtained a license therefor, as hereinafter provided:

SEC. 4. And be it further enacted, That every person liable for license tax, who falling to pay the same within thirty days after the same has become due and payable, for such neglect shall, in
24 addition to the license tax imposed, pay a fine or penalty of not less than five nor more than fifty dollars, and a like fine or penalty for every subsequent offense.

* * * * * * *

Thirty-eight. Real-estate agents shall pay twenty-five dollars annually, and in addition pay monthly a tax of one-fourth per centum on gross receipts. Every person whose business it is to sell or offer for sale real estate for others, or rent houses, stores, or other buildings, or real estate, or collect rents for others, shall be regarded as real-estate agents:

Provided, That license as real-estate agents shall not authorize any person to act as auctioneer without license as such.

Testimony of Joseph T. Offutt in Rebuttal.

And then the defendant rested; and thereupon the plaintiff, Joseph T. Offutt, was recalled and testified, in rebuttal, that neither at the Centre market nor at any other place did the defendant, prior to the sale made by the plaintiff, tell him (witness) not to sell the property or request him to return the paper of November 27, 1887, or take his (defendant's) name from it or claim that it had been revoked.

And the foregoing was all the evidence given in said cause.

And thereupon, after argument by counsel for the respective parties, the jury was charged by the court, and about 4 o'clock p. m. of Friday, June 29, 1890, the court directed the jury to retire, in
22 charge of a bailiff, with instructions, in case of their agreement, to reduce their verdict to writing and seal the same and return it to the court on the following Monday morning; at which time the jury, in open court, through their foreman, returned a sealed verdict, which was opened by the court and which read as follows: "We, the jurors composing the jury in this cause, find for the plaintiff," and was signed by all the members of said jury, and thereupon the jury were informed by the court that the verdict was informal, as the amount of their finding was not stated in it; whereupon the foreman of the jury stated to the court on behalf of the jury that before the writing and signing of the verdict by the jury the jury had agreed upon the amount, but had thought it unnecessary to state it in the paper; and thereupon the defendant, by his counsel, moved that the verdict as returned be recorded as the finding of the jury, which motion was overruled by the court; and thereupon the jury were directed by the court to retire, in charge of a bailiff, and complete their verdict by the addition of the amount which they found to be due; and thereupon the jury returned their verdict as follaws: "We, the jurors composing the jury in this cause, find for the plaintiff, and assess the damages at $5,000.00, with interest at 6 per cent. from day of sale;" and thereupon the plaintiff, by his counsel, remitted the interest so found and moved the court that the verdict stand and be recorded as a finding for the plaintiff of $5,000.00, which was done and entry of the verdict and judgment thereon was made upon the minutes of the court as follows:

And forasmuch as many of the said matters are not of record the defendant, by his counsel, moves the court that they may be made so, and that the foregoing statement be settled as a case, and it is done accordingly this 2nd day of August, A. D. 1890.

M. V. MONTGOMERY, *Justice.* [SEAL.]

23 *Bill of Exceptions.*

In the Supreme Court of the District of Columbia.

JOSEPH T. OFFUTT, Doing Business under the Name and Style of Joseph T. Offutt & Co., *vs.* LEWIS C. KENGLA.	At Law. No. 28233. No. —. Calendar of Term, 1890.

Be it remembered that on the trial of the above cause before Mr. Justice Montgomery and a jury the plaintiff, to maintain the issue on his part, gave evidence tending to prove, among other things, that on November 27, 1886, he was engaged in business as a real-estate broker, under the name and style of Joseph T. Offutt & Co.; that on said day the defendant gave him, by the name and style of Joseph T. Offutt & Co., in writing, the exclusive right for the period of six months to make *make* sale of certain lands of defendant in the county of Washington, D. C., for the sum of $30,000, of which $10,000 should be paid in cash and the balance on time to suit, and giving him, plaintiff, all over and above said sum for which he might make sale of said lands; that on April 27, 1887, he made sale of said lands to James A. Bates for the sum of $35,000, whereof $15,000 was by the terms of sale to be paid in cash and the balance in two equal investments in one and two years, with interest at six per centum, to be secured by deed of trust; that plaintiff on said November 27, 1886, had not taken out a license as a real-estate broker under the laws of the District of Columbia; which law is as follows:

Be it enacted by the legislative assembly of the District of Columbia, That no person shall be engaged in any trade, business, or profession hereinafter mentioned until he shall have obtained a license therefor, as hereinafter provided:

SEC. 4. And be it further enacted, That every person liable for license tax, who falling to pay the same within thirty days after the same has become due and payable, for such neglect shall, in
24 addition to the license tax imposed, pay a fine or penalty of not less than five nor more than fifty dollars, and a like fine or penalty for every subsequent offense.

* * * * * * *

Thirty-eight. Real-estate agents shall pay twenty-five dollars annually, and in addition pay monthly a tax of one-fourth per centum on gross receipts. Every person whose business it is to sell or offer for sale real estate for others, or rent houses, stores, or other buildings, or real estate, or collect rents for others, shall be regarded as real-estate agents:

Provided, That license as real-estate agents shall not authorize any person to act as auctioneer without license as such.

And did not take out such license until the month of April, 1887, a short time prior to making said sale; that he had refrained from taking out such license on the advice of Robert P. Dodge, the officer of said District in charge of the issuing of such license, who informed him that legislation was pending in Congress to change the license law as to real-estate brokers by doing away with the provisions requiring a bond and taxing gross receipts and requiring simply the payment of one license tax, and that when said law was passed plaintiff took out such license.

And thereupon the defendant, by his counsel, asked the court to instruct the jury *that*—

"That the plaintiff could not recover under the alleged contract with the defendant, having sold as a real-estate broker, because he was not a real-estate broker, not having obtained the license required by the laws of the District of Columbia."

Which instructions the court refused to give; to which refusal the defendant, by his counsel, then and there and before the jury retired to consider of their verdict, which was against defendant, excepted, and prayed that said exception be dated in the justice's minutes, which was done; and forasmuch — the said matters are not of record the defendant prays that they be made so, and that this defendant's first bill of exception may be signed, and it is done accordingly this 2nd day of August, now for then.

M. V. MONTGOMERY, *Justice.*

And be it further remembered that at the trial of said cause the plaintiff further gave, among other evidence, evidence tending to prove that the writing mentioned in the first bill of exceptions was of the tenor following:

Nov. 27, 1886.

I hereby give Joseph T. Offutt & Co. the exclusive right to sell my home place, and limit the time of six months—to sell at $30,000; property is situated near the Tenallytown and Georgetown road, in the D. C., consisting of 35 acres, more or less, for the sum of $30,000, in lawful U. S. money; terms, $10,000 down, the balance on time to suit, at six per cent., and give them all above my price above for their commission.

L. C. KENGLA.

And further gave evidence tending to prove that the plaintiff had made sale of said land to James A. Bates on April 27, 1887, within the said period of six months, for the sum of $35,000, whereof $15,000 was to be paid in cash and the balance in two equal instalments in one and two years, with interest at six per centum per annum, to be secured by deed of trust upon the property, and that said Bates was able and willing to consummate said sale, &c.; that in fixing said terms of sale plaintiff had not consulted with the defendant, as he did not think it necessary.

And thereupon defendant, by his counsel, asked the court to instruct the jury—

"That the plaintiff could not recover, because there was no compliance by him with the stipulation of the alleged contract that $10,000 should be paid in cash and the balance in amounts to suit, the plaintiff having departed from the terms of the alleged
26 contract, having, in addition to the alleged reception of $15,000 instead of $10,000, fixed the time for the payment of the balance himself without any consultation with or knowledge of the defendant."

Which instruction the court refused to give, and to which refusal the defendant, by his counsel, then and there and before the jury retired to consider of their verdict, which was against the defendant, excepted, and prayed that the said exception might be noted on the minutes of the court, which was done; and forasmuch as the said matters are not of record the defendant prays that they may be made so, and that the defendant's 2d bill of exceptions may be signed and it is done accordingly this 2d day of August, 1890, now for then.

M. V. MONTGOMERY, *Justice.*

And be it further remembered that at the trial of said cause the plaintiff gave evidence tending to prove that after the signature and delivering to him of the instrument in the foregoing 2d bill of exceptions mentioned the plaintiff called on sundry persons and endeavored to effect a sale of the property to them; that he called on James B. Wimer, of the firm of Cutter & Wimer, real-estate agents, told him of his employment to sell said property, and showed him the said instrument of authority and asked his aid in effecting a sale; that Mr. Wimer subsequently told plaintiff that he, Wimer, had a purchaser for the property if it suited; that plaintiff took said Wimer out to look at the property, and introduced him to defendant, stating that he, Wimer, was a real-estate dealer and that they had a purchaser for the place if it suited; that defendant showed them over the place, and after it had been examined defendant slapped plaintiff on the shoulder and said, "Joe, if you sell me out you will have to get me another place;" that a few days after this visit said Wimer took James A. Bates, a retired army officer, out to see the place, and he agreed to buy it for $35,000 on the terms set forth in the above 2d bill of exceptions, and said
27 Wimer took from him, said Bates, a deposit of $750, by check of said Bates to said Wimer, which he, Wimer, deposited to his, Wimer's, credit in Riggs & Co.'s bank, and thereupon reported his action in the premises to plaintiff, who thereupon notified defendant of the sale; and thereupon the defendant, by his counsel, asked the court to instruct the jury—

"That the plaintiff cannot recover because he did not make a sale of the defendant's property. If made at all, it was made by one Wimer and not by the plaintiff, the transaction between the alleged purchaser, Bates, being with the said Wimer, including the receipt of $750, and the check for the sum being in the name of

said Wimer and deposited in bank of Riggs & Co. to the credit of said Wimer."

Which instruction the court refused to give, and to which refusal the defendant then and there and before the jury retired to consider of their verdict, which was against the defendant, by his counsel, excepted and prayed that the exception might be noted on the minutes of the court, which was done; and forasmuch as the said matters are not of record the defendant, by his counsel, prays that they may be made so, and that this defendant's 3rd bill of exceptions may be signed, and it is accordingly done this 2nd day of August, 1890, now for then.

M. V. MONTGOMERY, *Justice.*

28 *Decree in General Term.*

In the Supreme Court of the District of Columbia, Sitting in General Term.

TUESDAY, *May* 31, 1892.

Session resumed pursuant to adjournment.

Present: Chief Justice Bingham and Justices James and Bradley.

JOSEPH T. OFFUTT, Trading as J. T. Offutt & Co., *vs.* LEWIS C. KENGLA. } 28233 Law Cal. 65.

Because it appears to the court here that there is no error in the record and proceedings and in the judgment at special term, it is considered by the court here that the judgment at special term herein be, and the same hereby is, affirmed in pursuance of and in accordance with the opinion of the court this 31st day of May, 1892.

Announced by Mr. Justice Bradley.

Order for Writ of Error.

In the Supreme Court of the District of Columbia, the 11 Day of July, 1892.

(Filed July 11, 1892. J. R. Young, clerk.)

Jos. T. OFFUTT, Trading, &c., *vs.* LEWIS C. KENGLA. } At Law. No. 28233.

The clerk of said court will issue a writ of error from Sup. C't of U. S. in above cause.

WILLIAM A. COOK,
Attorney for Defendant.

29 *Appeal Bond.*

In the Supreme Court of the District of Columbia, the 11 Day of July, 1892.

(Filed Jul- 11, 1892. J. R. Young, clerk.

JOSEPH T. OFFUTT, Lately Doing Business as Joseph T. Offutt & Company,
vs.
LEWIS C. KENGLA. } At Law. No. 28233.

Know all men by these presents that we, Lewis C. Kengla, George M. Kengla, and Francis I. Brooke, are bound unto the above-named Joseph T. Offutt in the sum of ten thousand dollars ($10,000.00), to be paid to the said Joseph T. Offutt, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 11th day of July, 1892.

Whereas the above-named Lewis C. Kengla has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of District of Columbia:

Now, therefore, the condition of this obligation is such that if the above-named Lewis C. Kengla shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

LEWIS C. KENGLA. [SEAL.]
GEO. M. KENGLA. [SEAL.]
FRANCIS I. BROOKE. [SEAL.]

Sealed and delivered in presence of—
JOHN R. YOUNG.

Approved the 11th day of July, 1892.

E. F. BINGHAM,
Chief Justice S. C. D. C.

30 *Notice of Motion to Vacate Approval of Bond.*

In the Supreme Court of the District of Columbia.

(Filed Jul- 15, 1892. J. R. Young, clerk.)

JOSEPH T. OFFUTT
vs.
LEWIS C. KENGLA. } At Law. No. —.

Please take notice that I shall on Friday, the 15th day of July, 1892, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, move the chief justice to vacate the approval by him

of the bond of the said defendant, with Francis I. Brooke and George M. Kengla as sureties, in the penal sum of $10,000, on alleged writ of error in said cause from the judgment of this court to the Supreme Court of the United States, and to strike the said bond from the files of the clerk's office of this court, on the ground that said approval was improvidently given and ought to be revoked for the reason, among others, that the said Supreme Court has no jurisdiction of the judgment rendered by the general term of this court in said cause, nor had any writ of error been allowed in said case by any judge of this court or by any justice of the said Supreme Court of the United States at the time of the approval of said bond.

HUGH T. TAGGART,
Att'y for Plaintiff.

To Wm. A. Cook, att'y for def't.

I hereby certify that I left a copy of the within notice at the office of Wm. A. Cook this 13th day of July, 1892.

ALBERT HARPER.

Motion to Vacate.

In the Supreme Court of the District of Columbia.

(Filed Jul- 15, 1892. J. R. Young, clerk.)

JOSEPH T. OFFUTT
vs.
LEWIS C. KENGLA. } At Law. No. —.

And now comes the plaintiff, by Hugh T. Taggart, his at-
31 torney, and moves the chief justice of this court to vacate the approval by him of the bond of the defendant, with Francis I. Brooke and George M. Kengla as sureties, in the penal sum of $10,000, on alleged writ of error in said cause from the judgment of the general term of this court to the Supreme Court of the United States, and to strike the said bond from the files of the clerk's office of this court, on the ground that said approval was improvidently given and ought to be revoked for the reason, among others, that the said Supreme Court has no jurisdiction of the judgment rendered by the general term of this court in said cause, nor had any writ of error been allowed in said case by any judge of this court or by any justice of the said Supreme Court of the United States at the time of the approval of said bond.

HUGH T. TAGGART,
Att'y for Pl'f.

Affidavit of Pl'tff in Support of Motion.

In the Supreme Court of the District of Columbia.

(Filed Jul- 19, 1892. J. R. Young, clerk.)

JOSEPH T. OFFUTT
vs.
LEWIS C. KENGLA. } No. —. At Law.

Joseph T. Offutt, being by me duly sworn, doth say that he is the plaintiff in the above-entitled cause, and that he obtained from the assessor of the District of Columbia a certificate as to the real estate assessed to George M. Kengla and others, and as to the fact that there is no real estate assessed to Francis I. Brooke, and that deponent has examined the cause No. 19478 on the docket of law causes in this court, and that the judgment obtained therein by the Washington Market Company *vs.* Francis I. Brooke is unsatisfied of record, and that he has also examined the cause No. 18218 on said docket, and that the judgment obtained therein against Francis I. Brooke by the Northern Liberty Market Company is unsatisfied of record.

That deponent has known said Francis I. Brooke for years
32 past—from 20 to 25 years—and that he does not know of any property owned or possessed by said Brooke which would justify him in qualifying upon a bond or obligation in the sum of $10,000.00 or in any other sum whatever to which the possession or ownership of property was necessary.

JOSEPH T. OFFUTT.

Subscribed and sworn to before me this 13 July, 1892.

J. R. YOUNG, *Clerk*,
By R. WILLETT, *Ass't Clerk.*

Certificate of the Assessor of D. C. in Support of Motion.

(Filed Jul- 19, 1892. J. R. Young, clerk.)

Office of the assessor, District of Columbia.

WASHINGTON, *July* 13, 1892.

This certifies that the records of this office show no real estate assessed in the individual name of George M. Kengla, and that there is real estate assessed to him and others as follows:

George M. and Charles Robert Kengla and Joseph Weaver, in Georgetown, $11,660.

To George M. and Charles R. Kengla, in Georgetown, $1,645.

To George M. Kengla and Joseph T. Weaver, in Georgetown, $436.

In county, to George M. and Charles R. Kengla, $5,438.

It is further certified that said records show no real estate assessed to Francis I. Brooke.

MATTHEW TRIMBLE,
Assessor, D. C.

Order Vacating Bond.

In the Supreme Court of the District of Columbia. In General Term.

(Filed Jul- 19, 1892. J. R. Young, clerk.)

JOSEPH T. OFFUTT
vs.
LEWIS C. KENGLA. } At Law. No. 28233.

It appearing to the court that the bond of the defendant,
33 with Francis I. Brooke and George M. Kengla as sureties, conditioned in the penal sum $10,000.00, for the prosecution of a writ of error from the Supreme Court of the United States to the judgment of this court in the above-entitled cause, was improvidently approved, it is this 19th day of July, 1892, upon motion of Hugh T. Taggart, attorney for the plaintiff, ordered that the said approval be, and the same is hereby, vacated, and that the said bond be, and the same is hereby, declared to be of no effect in said cause.

By the court:

A. B. HAGNER,
Asso. Justice.

Notice of App'l for Writ of Error.

In the Supreme Court of the District of Columbia.

(Filed Jul- 22, 1892. J. R. Young, clerk.)

JOSEPH T. OFFUTT, Lately Doing Business under the Name and Style of Joseph T. Offut & Company,
vs.
LEWIS KENGLA. } At Law. No. 28233.

To Hugh T. Taggart, att'y for the pl't'ff:

It is the intention of the defendant to take out a writ of error in the above-entitled cause, and to have the same carried to the Supreme Court of the United States, and in pursuance thereof and therefor we will make application to Hon. A. B. Hagner, one of the justices of said court, at the city hall, in the city of Washington, District of Columbia, on Tuesday, the 26th day of July, 1892, at 10 o'clock a. m., or as soon thereafter as the said justice will hear the application, and will offer as sureties on the appeal bond George M. Kengla, of Wisconsin avenue, and Anton Ruppert, of Bladensburg road.

COOK & SUTHERLAND,
Att'ys for Def't.

July 22, 1892.

34 *Marshal's Return.*

Served copy of the within notice of application for writ of error on H. T. Taggart, Esq., attorney for plaintiff, July 22, 1892.

D. M. RANSDELL, *Marshal.*

Order for Writ of Error.

In the Supreme Court of the District of Columbia, the 26th Day of July, 1892.

(Filed Jul- 26, 1892. J. R. Young, clerk.)

JOSEPH T. OFFUTT, Trading under Name and Style of Joseph T. Offutt & Co.,
vs.
LEWIS C. KENGLA. } At Law. No. 28233.

The clerk of said court will issue a writ of error and all necessary papers thereto to carry case to Supreme Court of the United States.

WILLIAM A. COOK,
Attorney for —.

Appeal Bond.

In the Supreme Court of the District of Columbia, the 26 Day of July, 1892.

(Filed Jul- 26, 1892. J. R. Young, clerk.)

JOSEPH T. OFFUTT, Lately Doing Business as Joseph T. Offutt & Company,
vs.
LEWIS C. KENGLA. } At Law. No. 28233.

Know all men by these presents that we, Lewis C. Kengla, George M. Kengla, and Anthony Ruppert, are bound unto the above-named Joseph T. Offut in the sum of ten thousand dollars ($10,000.00), to be paid to the said Joseph T. Offutt, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and
35 our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 26th day of July, 1892.

Whereas the above-named Lewis C. Kengla has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia: Now, therefore, the condition of this obligation is such that if the above-named Lewis C. Kengla shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

LEWIS C. KENGLA. [SEAL.]
GEO. M. KENGLA. [SEAL.]
ANTON RUPPERT. [SEAL.]

Sealed and delivered in presence of—
JOHN R. YOUNG.

Approved the 26 day of July, 1892.

A. B. HAGNER,
Justice S. C. D. C.

36 *Writ of Error to the Supreme Court of the United States.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea which is in the said court, before you, between Joseph T. Offutt, lately doing business as Joseph T. Offutt and Company, plaintiff, and Lewis C. Kengla, defendant, being No. 28233 at law, a manifest error hath happened, to the great damage of the said Lewis C. Kengla, as by his complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 26th day of July, in the year of our Lord 1892, and of the Independence of the United States the one hundred and seventeenth.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk.*

37 *Citation to the Supreme Court of the United States.*

The United States of America to Joseph T. Offutt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Lewis C. Kengla is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness A. B. Hagner, associate justice of the said supreme court of the District of Columbia, in the year of our Lord one thousand eight hundred and ninety-two.

A. B. HAGNER,
Associate Justice.

On this — day of ——, in the year of our Lord one thousand eight hundred and —, personally appeared before me, the subscriber,

—— ——, and makes oath that he delivered a true copy of the above citation to —— ——.

—— ——.

Service acknowledged this 12th day of August, 1892.
HUGH T. TAGGART,
Attorney for Joseph T. Offutt.

38 *Service acknowledged this 12th day of August, 1892.*
HUGH T. TAGGART,
Attorney for Joseph T. Offutt.

Clerk's Certificate.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing contains a true copy of the printed record in said cause upon which the court in general term heard and decided said case, and true copies of all orders made in said case by the court, and the writ of error, citation, and copy of the bond given by the plaintiff in error, and that the original record is not on file in this office (except the orders of the court and the proceedings subsequent to the judgment of the general term) and was not at the time said cause was heard by the general term.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 22d day of August, 1892.
J. R. YOUNG, *Clerk,*
By L. P. WILLIAMS,
Ass't Clerk.

Endorsed on cover: Case No. 15,113. District of Columbia supreme court. Term No., 1143. Lewis C. Kengla, plaintiff in error, *vs.* Joseph T. Offutt, lately doing business as Joseph T. Offutt & Company. Filed August 26th, 1892.

Office Supreme Court U. S.
FILED.
MAR 10 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

LEWIS C. KENGLA,
Plaintiff in Error,

vs.

JOSEPH T. OFFUTT,
Defendant in Error.

Term No. 1,043.

(Case No. 15,113.)

Brief for Defendant in Error on Motion to Dismiss for Want of Jurisdiction.

HUGH T. TAGGART,
For Defendant in Error.

Motion to Dismiss for want of Jurisdiction.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

LEWIS C. KENGLA, *Plaintiff in Error,*	Term No. 1,043.
vs.	(Case No. 15,113.)
JOSEPH T. OFFUTT, *Defendant in Error.*	

In Error to the Supreme Court of the District of Columbia.

And now comes Joseph T. Offutt, the defendant in error, by Hugh T. Taggart, his attorney, and and moves the court to dismiss the writ of error in the above entitled cause for the reason that the matter in dispute exclusive of costs does not exceed five thousand dollars, and neither the validity of a copyright, a treaty or statute of the United States is involved, nor an authority exercised under the United States drawn in question; and the court is, therefore, without jurisdiction to entertain the said writ under the Act of Congress of March 3, 1885.

HUGH T. TAGGART,
Attorney for Defendant in Error.

Take notice that on Monday, March 13; 1893, at the opening of the court, or as soon thereafter as counsel can be heard, I shall call up the above motion to dismiss for want of jurisdiction.

HUGH T. TAGGART,
Attorney for Defendant in Error.

To WILLIAM A. COOK, ESQ.,
Attorney for Plaintiff in Error.

Service acknowledged this 17th day of February, 1893, of the above notice, and of copy of motion therein referred to, and also of copy of brief on behalf of the defendant in error in support of said motion.

WILLIAM A. COOK,
Attorney for Plaintiff in Error.

Endorsed: Supreme Court U. S,, No. 1,043, October Term, 1892, *Lewis C. Kengla, Pl'ff in Error*, vs. *Joseph T. Offutt, Def't in Error.* Motion to dismiss and notice.

[Filed Feb. 18, 1893.—James H. McKenney, Clerk.]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

LEWIS C. KENGLA, *Plaintiff in Error,*	Term No. 1,043.
vs.	(Case No. 15,113.)
JOSEPH T. OFFUTT, *Defendant in Error.*	

Brief for Defendant in Error on Motion to Dismiss.

The defendant in error declared in assumpsit, in the court below, to recover $5,000 with interest from the 27th day of April, 1887, for services in effecting on that day, a sale of certain real estate for the plaintiff in error, and the general issue was pleaded; there was a verdict in his favor, and a remitter of interest, and thereupon judgment was entered for $5,000 and costs.

A motion for a new trial addressed to the discretion of the trial court was filed, which was overruled; and, on appeal to the General Term, the case was heard upon a case stated and separate formal bills of exception.

The judgment of the appellate court was simply an affirmance of the judgment below.

The judgment entered in the trial court, on page 8 of the record, is printed out of place; it should have been printed at the end of the case stated, on page 16 of the record, and after the statement of facts attending the rendition of the verdict.

The judgment of affirmance in the General Term is printed on page 20 of the record.

These judgments are the only portions of the record specially material to the consideration of the present motion; by them the value of the matter in dispute must be determined.

In *Thompson* vs. *Butler*, 95 U. S., 694, Mr. Chief Justice Waite, in delivering the opinion of the court, says:

"Our jurisdiction can not be invoked until the final judgment below has been rendered; and we can not open the record to look for errors until jurisdiction has been established. The Court below retains full jurisdiction of a cause until final judgment has been entered; and it follows that if for any reason a judgment has been given against a defendant in a case involving the plaintiff's cause of action alone, unaffected by counter-claim or set off, for a sum less than our jurisdictional amount, we have no power, at the instance of the defendant, to correct errors that may have been committed in settling the amount. We can only look at a verdict through the record; and if the record is closed to us, so necessarily must be the verdict. In this case, therefore, we are precluded from inquiry into the propriety of allowing the verdict to be reduced before judgment was entered upon it."

The principles of this decision were applied in the following cases:

Alabama Gold Life Ins. Co. vs. *Nichols*, 109 U. S., 232;

First Nat. Bank of Omaha vs. *Redick*, 110 U. S., 224;
Railroad Co. vs. *Trook*, 100 U. S. 112;
Pacific Tel. Co. vs. *O'Connor*, 128 U. S. 394.

The decision of this Court, in *District of Columbia* vs. *Gannon* (130 U. S. 227), is precisely in point; in that case Mr. Chief Justice Fuller delivering the opinion of the Court says:

"Under the act of Congress of March 3, 1885, (23 Stats. 443) no appeal or writ of error can be allowed from any judgment or decree, in any suit at law or in equity in the Supreme Court of the District of Columbia, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, or unless the validity of a copyright, or the validity of a treaty or statute of, or an authority exercised under the United States is drawn in question.

"The judgment in the case at bar, as rendered at special term, was for five thousand dollars and costs, and this was affirmed with costs, but not with interest; the general term thereby simply declaring that it was satisfied, to let the former judgment stand. In all particulars material to the inquiry as to the value of the matter in dispute, the record is the same as in *Railroad Company* vs. *Trook*, 100 U. S. 112, where this court speaking by Mr. Chief Justice Waite said: 'In cases brought here on writ of error for the re-examination of judgments of affirmance in the Supreme Court of the District of Columbia, the value of the matter in dispute is determined by the judgment affirmed, without adding interest or costs.' This rule has been repeatedly so laid down."

The judgment as entered in the court below, in the present case, is in the following terms:

"Thereupon it is considered that the plaintiff recover against said defendant five thousand dollars,

being the money payable to him by the defendant, by reason of the premises, and $—— for his costs of suit, and have execution thereof." (Record, p. 8.)

The judgment of the General Term was one of affirmance simply. (Record, p. 20.) "The General Term thereby simply declaring," in the language of Mr. Chief Justice Fuller in the case of Gannon, "that it was satisfied to let the former judgment stand."

It is respectfully submitted that the motion should be granted.

HUGH T. TAGGART,
Att'y for Def't in Error.

Office Supreme Court U. S.
FILED.
MAR 20 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

LEWIS C. KENGLA, *Plaintiff in Error*,
vs.
JOSEPH T. OFFUTT,
lately doing business as
JOSEPH T. OFFUTT & COMPANY.
Term No. 1143.

In Error to the Supreme Court of the District of Columbia.

MOTION OF APPELLEE TO DISMISS FOR WANT OF JURISDICTION.

BRIEF AGAINST MOTION FOR APPELLANT.

WILLIAM A. COOK,

Attorney.

Beresford, Printer,
Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1892.

LEWIS C. KENGLA, *Plaintiff in Error,*
vs.
JOSEPH T. OFFUTT,
lately doing business as
JOSEPH T. OFFUTT & COMPANY.
} Term No. 1143.

In Error to the Supreme Court of the District of Columbia.

MOTION OF APPELLEE TO DISMISS FOR WANT OF JURISDICTION.

BRIEF AGAINST MOTION FOR APPELLANT.

WILLIAM A. COOK, *Attorney.*

THE FACTS.

The defendant in error, Joseph T. Offutt, instituted suit, November 9, 1887, against the plaintiff in error, Lewis C. Kengla, in the Supreme Court of the District of Columbia, in which he claimed $5,000, with interest from the 27th of April, 1887, with costs. (Record, pages 1 to 4.)

The suit was based on an alleged contract for commissions between the parties (Record, p. —) for the sale of real estate. The defendant below filed pleas and affidavits of defense to the claim of the plaintiff below.

The case was submitted to a jury on the 27th of June, 1890 (which was Saturday). The jury, on the 30th of June, 1890 (Monday), returned in the Court (having separated on Saturday), with a sealed verdict, signed by each of the jurymen. This verdict simply found, without designating any amount, for the plaintiff, *with interest from date of sale.* (Record, p. 7.)

The defendant below insisted that the verdict be recorded as rendered.

This the presiding justice refused to do, and directed the jury to retire and fix the amount. The defendant in error excepting, this was nevertheless done. (Record, pp. 7, 8 and 9.)

The jury, acting under the direction of the Court, retired and shortly returned a verdict of $5,000, *with interest* from the day of sale. This verdict was as follows, the parts in brackets being changes from the original or added thereto:

> "We, the jurors comprising the jury in this cause, find for the plaintiff [and assess the damages at the sum of five thousand dollars ($5,000), with interest at 6 per cent. from date of sale.]"

The recording of this verdict was objected to, because it was not the one rendered by the jury and sealed by them on Friday. (Record, pp. 7 and 8.)

The defendant then objected by his attorney to the recording of the second verdict, and then excepted thereto. The exception was overruled, and thereupon the attorney for the plaintiff, before the verdict was recorded, voluntarily ("*agreed to a remittitur of the interest.*")

The verdict was then entered as follows (Record, p. 8):

> "It was considered that the plaintiff recover against the said defendant $5,000, being the money payable to him by the defendant, by reason of the premises, and $— for his costs of suit, and have execution thereof." (Record, p. 8.)

Upon this being done, the defendant by his attorney moved the Court to set aside and vacate the judgment for several reasons mentioned. (Record, p. 9.)

And also filed a motion for a new trial. (Record, p. 9.)

These motions do not appear to have been acted upon in the Court below. Nevertheless, a stated case was prepared, as well as bills of exceptions, and an appeal taken to the Supreme Court of the District of Columbia, in General Term. (Record, pp. 10, 11, 12, 13, 14, 15, 16 and 17.)

On the 31st of May, 1892, the Court in General Term delivered its opinion (but filed none), and this entry was made in the case:

> "Because it appears to the Court here that there is no error in the record and proceedings and in the judgment at Special Term, it is considered by the Court here that the judgment at Special Term herein be and the same is hereby affirmed, in pursuance of and in accordance with the opinion of the Court, this 31st day of May, 1892."

Thereafter a writ of error was allowed (Record, pp. 24, 25 and 26), and the case removed to this Court.

A motion is now made to dismiss the case, on the ground that the verdict rendered on the 30th of June, 1890, was only for the sum of $5,000, and that the affirmance of the General Term was only of this judgment.

POINTS OF ARGUMENT.

I.

It may not be amiss first to fix attention on improper methods in which the verdict was rendered, and attempted to be reduced to $5,000.

This reduction was at the suggestion of the attorney of the plaintiff below. The words of the record are, "Mr. Taggart (no one else) agrees to a *remittitur* of the interest." (Record, p. 8.)

It will be observed that no consent was given to this by the attorneys of the defendant; but the Court concurred, and thereupon the verdict was received with the so-called *remittitur*. It will be observed, too, that this exclusion of the interest was

in advance of the verdict, as amended, being recorded. It was not a *remittitur;* it was an interception of the verdict a second time as rendered, while in the hands of the jury and prior to its record.

The purpose of this reduction was manifestly improper, viz., *to prevent an appeal to this Court.*

In this, there was no concealment. This purpose has been persistently adhered to—was exhibited in an effort to prevent a writ of error being signed by Justice Hagner—and is manifested in the present motion.

III.

The provisions of the law of the District require that all judgments *ex contractu* shall be on interest at the rate of 6 per cent. per annum until paid.

These provisions are as follows, viz.:

> "Upon *all* judgments rendered on the common law side of the court in actions founded *on contracts* interest at the rate of 6 per centum per annum *shall be* awarded on the principal sum due until the judgment shall be satisfied, and the amount which is to bear interest and the time from which it is to be paid shall be ascertained by the verdict of the jury sworn in the cause." (Original Act, June 24, 1812, 2 U. S. at L., 756; sec. 829 Rev. St. D. C., p. 98.)
>
> "The *rate of interest upon judgments* or decrees, and upon the loan or forebearance of any money, goods or things in action, shall continue to *be six dollars* upon one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time, except as provided in this chapter." (Original Acts of 22 Ap., 1870, 16 St. at L., p. 91; sec. 713 Rev. St. D. C., p. 85.)

It will thus be seen that by the letter and intention of the law, judgments of the class involved in this case carry interest from the date of their entry until satisfied.

While this is the demand of the law, the practice has been accordingly. It is the local law and practice.

IV.

What, then, was the condition of the case as regards the amount involved, when affirmed in the Court below, or General Term, assuming the entry of the judgment in the Special Term to have been correct? It was this:

June 20, 1890, judgment as recorded, .	$5,000.00
Interest until May 31, 1892, the date of affirmance in General Term, .	450.00
Amount due at date of affirmance, .	$5,450.00

This is the amount for which execution could have been issued at the date of the affirmance, and for which, with small additions, it would have been issued shortly after, and which the Marshal would have collected, except for the intervention of the writ of error.

V.

The affirmance did not and could not exclude the interest, which had then accrued.

The General Term had no power to do this. It did not attempt it. The law determined the interest. The affirmance was simply in these words:

> "Because it appears to the Court here that there is no error in the record and proceedings, and in the judgment at Special Term, it is considered by the Court here that the judgment at Special Term herein be, and the same hereby is, affirmed in pursuance of and in accordance with the opinion of the Court this 31st day of May, 1892."
>
> Announced by Mr. Justice Bradley.

It will be observed that the entry of affirmance contains these words: "The same hereby is affirmed in pursuance of and in accordance with the opinion of the Court this 31 day of May, 1892." But, while a written opinion was delivered, it was not filed, and all efforts to procure it have been unavailing.

Neither at the delivery of the opinion nor during the arguments, nor at any other time, was there any effort made to remit on behalf of the plaintiff the accrued interest in the General Term. Such an effort would not have been tolerated. No ground for it existed; none could have been offered, except to prevent an appeal.

VI.

Such being the facts, what is the law?

Is the jurisdiction of this Court (admitting what can not be done—the validity of the proceedings and judgment in the trial court) to be determined according to the amount of that judgment as entered in the Special Term on the 27th of June, 1890, or according to the amount of that judgment, with accrued interest, as it existed in the General Term on the day of affirmance May 31st, 1892?

The position of the appellee is the former; the position of the appellant the latter.

1. The appeal is not from the trial court, but from the General Term.

2. It could not be otherwise, in view of the law authorizing appeals from the Supreme Court of the District of Columbia to the Supreme Court of the United States.

> "*Be it enacted, &c.*, That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or in the Supreme Court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars." (Act of March 3, 1885; 18 U. S. St. at L., 443; Richardson's Sup., 2d ed., p. 485.)

The most pertinent decisions of this Court seem to sustain the position of the appellant.

Some of the chief cases may be cited.

"The value of the matter in dispute is to be determined by the amount due at the time of the judgment brought here for review, to wit, the judgment of the Supreme Court of the Territory, *and not at the time of the judgment of the District Court. Adding the interest to the judgment of the District Court, until the date of that of the Supreme Court*, as we must, for the purpose of determining our jurisdiction, (The Patapsco, 12 Wall., 451; N. Y. Elevated Railroad *vs.* Fifth National Bank, 118 U. S., 608), we find that the amount due at the time of the judgment of the Supreme Court was considerably more than $5,000. The motion to dismiss is, therefore, denied."

Zeckendof *vs.* Johnson, 23 U. S., pp. 617, 618.

This case, in which the opinion was delivered by the late Chief Justice Waite, clearly holds that the question of jurisdiction has no reference to the amount due in the District Court, or the trial Court, but to the amount due in the Supreme Court of the Territory from which the appeal was taken, and as the amount, with interest added to the principal judgment, then and there exceeded $5,000, the Court had jurisdiction.

It was subsequently cited with approval in Keller *vs.* Ashford, 133, p. 610.

In that case, the Court, through Mr. Justice Gray, says:

"In a suit founded upon a contract the sum in dispute at the time of the judgment or decree appealed from, including any interest then accrued, is the test of appellate jurisdiction. Bank of United States *vs.* Daniel, 12 Pet., 32, 52; The Patapsco, 12 Wall., 451; New York Elevated Railroad *vs.* Fifth National Bank, 118 U. S., 608; Zeckendorf *vs.* Johnson, 123 U. S., 617. By the express terms of the promissory note sued on in this case, it bore interest at the rate of 8 per cent. yearly from its date until paid. Computing interest, accordingly, the sum in dispute was much more than $2,500 at the time of the decree in General Term, which was the decree from which this appeal was taken. In Railroad Co. *vs.* Trook, 100 U. S., 112, cited for the appellee, as in District of Columbia *vs.* Gannon, 130 U. S., 227, the judgment in Special Term was for damages in an action sounding in tort, which bore no interest either by the general law or by the judgment of affirmance in General Term."

Keller *vs.* Ashford, 133 U. S., 610, 617, 618.

This case is no less clear and conclusive than the former case.

The case of the District of Columbia *vs.* Gannon, 130 U. S., 297, in which the opinion was delivered by the Chief Justice, is not in conflict with these cases.

This case involved a question as to interest in an action of tort; but in its decision it is said:

> "Where interest, instead of accompanying the judgment or decree as damages for the detention of a specific amount adjudged or decreed, is part of the claim litigated, and the judgment or decree is so framed as to provide for it to run from a period antecedent to the rendition of such judgment or decree, *or, in action ex contractu, according to the terms of the contract upon which the action is based, jurisdiction may attach.* Zeckendorf *vs.* Johnson, 123 U. S., 617; The Patapsco, 12 Wall., 451; The Rio Grande, 19 Wall., 178. This result would have followed here, if, by the judgment of affirmance, interest had been directed to be added to the judgment at Special Term. As it is, however, the judgment falls below the amount necessary to give us jurisdiction."
>
> 130 U. S., p. 288.

This is an action *ex contractu*, and the claim of the plaintiff in the Special Term, as set forth in his declaration, was for $5,000, *with interest.* It was there a part of the demand of the plaintiff; and the exclusion of interest terminated at the date of the entry of the judgment.

The case of Massachusetts Benefit Association *vs.* Mills is deserving of attention.

In that case the Court, through Mr. Justice Brown, says:

> "But by an act of the legislature of Pennsylvania, passed in 1889, it is declared to 'be lawful for any party or parties, in whose favor any verdict may be rendered for a specific sum of money, to collect and receive interest upon such sum from the date of the verdict, whether by a court of original jurisdiction, or by the Supreme Court, shall be deemed and held to be a judgment for the sum found by the verdict, with interest from the date of such finding.' (Purdon's Digest, Verdict, pl. 3.)

"We regard *this* statute as settling the question in favor of our jurisdiction. Section 966, while providing only for interest upon judgments, does not exclude the idea of a power in the several States to allow interest upon verdicts, and where such allowance is expressly made by a State statute, *we consider it a right* given to a successful plaintiff, of which he ought not to be deprived by a removal of his case to the Federal Court. The Courts of the State and the Federal Courts sitting within the State should be in harmony upon this point. Both in Holden *vs.* Trust Company, 100 U. S., 72, and in Ohio *vs.* Frank, 103 U. S., 697, it was held that *the question of interest is always one of local law.* This is also recognized in the 23d Rule of this Court, which allows interest upon the the judgment of the inferior Courts at such rate as similar judgments bear interest in the Courts of the State where such judgment is rendered, whenever upon writ of error from this Court the judgment of such inferior Court is affirmed."

137 U. S., 691, 692.

What was true in this case is true in the present.

The local law distinctly provides:

"That on all judgments rendered on the common law side of the Court in actions founded on contract, interest at the rate of six per cent. per annum shall be awarded on the principal sum due until the judgment shall be satisfied."

This is the rule and theory of the law in the District of Columbia. As regards judgments of justices of the peace, it is provided:

"Judgments shall be at interest from their dates until paid or satisfied."

Rev. St. D. C., p. 118, Sec. 1007.

The plaintiff below (defendant above), notwithstanding the limited *remittitur* in the Special Term, is entitled to interest from the date of the judgment, and from that date the defendant below (plaintiff above) is responsible for the interest.

Hence, according to this case, (Massachusetts Benefit Association *vs.* Mills) the amount in the Supreme Court of the District of Columbia exceeded at the date of the affirmance in that Court $5,000 by $450, and, in the absence of any *remittitur* of this accrued and statutory interest at the date of the affirmance, jurisdiction attaches and exists.

But it is to be observed that in the "stated case" questions arise on the record as to the mode the verdict was received and entered, and as to what is treated as a *remittitur* of interest, not made after the judgment, but before the verdict was received. Can these matters be considered on the present motion? They involve the question as to the entry of the judgment without interest.

ADDENDA.

The brief of the defendant in error on the motion to dismiss states correctly that the case on appeal to the General Term "was heard upon a case stated and separate formal bill of exceptions."

It is correctly added "that the judgment of the appellate Court was simply an affirmance of the judgment below." But these are immaterial statements in view of the provision of the laws cited above, which provide that all judgments resting on contracts shall draw interest from the date of the judgment.

These laws enter into and constitute a part of the judgment rendered on contracts, and cannot be extinguished by a *remittitur* of interest on judgments rendered by a jury. The so-called *remittitur*, if of any value at all in this case, would not extend beyond the entry of judgment. Upon that entry interest at 6 per cent. commenced to run and continued until the taking of the appeal, and until the disposition of the case in General Term. The exclusion of this interest could only have occurred in consequence of an additional *remittitur* suggested in the General Term, and allowed by it. But no suggestion was there made of this kind; and had it been, it is obvious that it would have been objected to, because it would

have been apparent its purpose would have been to prevent an appeal to this Court.

The cases cited in the brief on behalf of the defendant in error are irrelevant to the facts and law of the case. That in The District of Columbia *vs.* Gannon was an opinion in an action of tort, and in its delivery a distinction is made as to the rule of interest in actions of tort and contract.

It is submitted that it would be neither fair, just or legal to allow the motion to dismiss.

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